85-144

Office-Supreme Court, U.S.
FILED
JUL 23 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN D. MOSS, JR. and DIANE C. MOSS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Can petitioners deduct Mr. Moss' share of amounts incurred by his law firm for daily luncheon meetings as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954, as amended ("Code")?

Alternatively, can petitioners deduct Mr. Moss' share of the foregoing amounts as educational expenses under Section 162(a) of the Code?

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OPINIONS BELOW

The Court of Appeals for the Seventh Circuit affirmed the decision of the United States Tax Court in favor of the respondent on March 27, 1985. ____ F.2d ____ (7th Cir. 1985) The Court of Appeals for the Seventh Circuit denied a petition for rehearing en banc on April 25, 1985. Copies of the opinion and order denying the rehearing appear in Appendix A, infra, pp. 1-7.

The United States Tax Court filed its opinion in this case on May 25, 1983. 80 T.C. No. 57. The United States Tax Court entered its decision in this case on January 17, 1984. (Copies of the lower court's opinion and decision appears in Appendix B, infra, pp. 1-22.

JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which entered its decision on March 27, 1985 and

which denied a rehearing en banc on April 25, 1985. Jurisdiction for the United States Supreme Court arises pursuant to 28 USC 1254 as cited in 26 USC 7482(a) and by timely filing of a notice of appeal with the Clerk of the United States Supreme Court pursuant to 28 USC 2101.

TABLE OF CASES, STATUTES, REGULATIONS AND OTHER AUTHORITIES

The Table of Contents and Appendix C set forth the provisions of the Internal Revenue Code of 1954, as amended, and other interpretive authorities which govern the deductibility of the business expenses in this case.

STATEMENT OF THE CASE

1. This case involves deficiencies in federal income taxes for the taxable years ending December 31, 1976 and December 31, 1977 (hereinafter referred to as the "contested years") in the amounts of $1,125.00 and $1,351.00, respectively.

2. The petitioners, husband and wife, filed joint income tax returns for the contested years. Mr. Moss, an attorney, was a partner in the law firm of Parrillo, Bresler, Weiss and Moss (hereinafter referred to as the "law firm") during the contested years.

3. The petitioners deducted Mr. Moss' share of the law firm's luncheon expenses in the respective amounts of $1,776.00 and $1,992.00 on their federal income tax returns in the contested years. The law firm incurred these expenditures for lunches consumed by its partners and associates during meetings held at Cafe Angelo, 225 N.

Wabash Avenue, Chicago, Illinois. The Commissioner of Internal Revenue (hereinafter Commissioner) disallowed the deductions.

4. Jurisdiction of the United States Tax Court arose from the issuance by the Commissioner of a notice of deficiency, dated March 31, 1980, in the federal income taxes of the petitioners for calendar years 1976 and 1977. The petitioners filed timely their petition on June 19, 1980 for a redetermination of the deficiencies set forth by the Commissioner.

The Tax Court entered its decision on January 17, 1984. Jurisdiction of the United States Court of Appeals for the Seventh Circuit arose from the appellants' timely filing of a notice of appeal with the Clerk of the Tax Court on April 16, 1984 and pursuant to 26 USC 7482(a).

5. The law firm specializes in insurance defense and nearly 90% of its

legal services rendered for the contested years arose out of its representation and defense of Safeway Insurance Company of Chicago, Illinois (T.p. 6, 7 and B. 3).[1/]

6. The law firm represented Safeway Insurance Company in over 3,000 cases in 1976 and over 4,000 cases in 1977 primarily in courts located at the Richard J. Daley Center in Chicago, Illinois. (T. p. 7-A, 11).

7. Robert Parrillo, the senior partner of the law firm, had the primary and final authority to decide all matters with respect to litigation involving Safeway Insurance Company. His partners and associates handled the details of these cases, but they did not make any final settlements without his approval. (T. p. 38 and B. 3).

1/ "B" refers to Appendix B; "T" refers to the transcript in the lower court; the number after the letter refers to the page in the reference which supports the statement.

8. Mr. Parrillo generally determined whether to litigate Safeway cases or to settle them prior to trial and the maximum amount of any settlement. (T. p. 29, 41 and B. 4).

9. The law firm handled five times as many trials and two or three times as many other cases as the average Chicago law firm in its specialty during the contested years. (T. p. 23).

10. The law firm employed no more than eight attorneys at any time during the contested years. (T. p. 13 and B. 3).

11. The large volume of cases caused the law firm to assign particular aspects of each case to different attorneys based on availability and ability to cover complex matters in and out of court. (T. p. 21, 23 and B. 4).

12. Since the law firm's attorneys spent most of their day in hearings or in depositions normally held at 10:00 A.M. or

2:00 P.M., their ability to meet depended on the courts' schedules. (T. p. 18, 19 and B. 5).

13. Since judges often held hearings on short notice, it was necessary for the law firm to assign cases and plan schedules at the last minute. (B. 3).

14. Since the courts generally recessed for lunch between twelve and one o'clock, the law firm's attorneys could meet usually only during the lunch hour. The lawyers needed to coordinate assignments and scheduling of their case load, and the noon hour was a logical, convenient time at which to do so. (T. p. 15, 18, 29 and B. 5 & 9).

15. The law firm's docket secretary maintained the firm's "Daily Call Sheet" which listed the case name, court number, "call" (or what item was pending), location and time of all matters scheduled. At lunch the attorneys would decide who would handle what matters and so note on the call sheet.

Mr. Parrillo and the other lawyers in the law firm made shorthand notations of their conversations of specific cases, e.g. status, depositions, settlements and other matters, for future reference and recollections on the "daily call sheets". The members and associates of the law firm used the "Daily Call Sheets" to memorialize their conversations regarding the business matters discussed at their daily luncheons. (T. p. 21, 22, 25, 26, 29, 30, 43 and B. 4).

16. The crowded schedule of the law firm's attorneys required them to meet daily at lunch to discuss the day's pending cases, to assign the afternoon court calls and depositions and to inform Mr. Parrillo of the status of each Safeway case. Over lunch the lawyers would decide who would attend various sessions; discuss issues and problems that had come up in the morning; answer questions and advise each other on how to handle certain pending matters; update Mr.

Parrillo on settlement negotiations; and naturally, engage in a certai amount of social banter. (T. p. 22, 35, 39, 40 and B. 4).

17. The noon hour was the most convenient and practical time for the firm to have its daily meeting. While the partners and associates could have met at 7:00 A.M. or 6:00 P.M., such meetings would have been less well attended and less effective. (B. 5).

18. The associates and members of the law firm did not have other reasonable opportunities besides the lunches to discuss business matters with each other because they had morning and afternoon court calls, considerable travel time and regular appearances weekly in the outlying courts in Cook County and the adjoining counties. (T. p. 9, 10, 11, 18, 33, 39, 40).

19. The daily luncheons allowed the law firm's attorneys to continue their

professional education with discussions among themselves on current developments in their legal specialty and professional trial strategy in specific cases, e.g. application of Dead Man's Statute or other evidentiary questions. (T. p. 27, 28, 41).

20. Martin Bresler, a partner in the law firm, had a brief medical career, and he has a brother who is a doctor. Mr. Bresler provided valuable insight into the medical aspects of many cases at these luncheon meetings. (T. p. 45).

21. The more experienced members of the firm were available to advise and educate the fledgling litigators. (B. 5-6).

22. The law firm required each attorney to attend the daily luncheons to the extent possible. Attorneys attended whenever possible for as long as possible; sometimes they ate; at other times they merely joined in the discussions. The firm paid for the meals of those lawyers who ate

during the firm meetings. (T. p. 14, 15 and B. 4 & 6).

23. They considered the meetings to be a part of their working day, not an hour of reprieve form business affairs. The individuals did not feel free to make alternate plans or to eat elsewhere. (B. 9).

24. The law firm's attorneys rarely drank or dawdled at lunch. Messrs. Parrillo and Moss kept careful track of the pending cases and other matters discussed at the law firm's daily luncheons even in the absence of their attendance. (T. p. 15, 17, 27, 44, 45 and B. 3-4).

25. The law firm's attorneys met daily at Cafe Angelo, a small, quiet public restaurant conveniently near the courts in the Richard J. Daley Center and the offices of the law firm. (T. p. 15 and B. 4).

26. The law firm chose Cafe Angelo as its meeting place because of the restaurant's proximity, quick service, reasonable

prices and relative quiet which permitted the discussion of business over lunch. (T. p. 17 and B. 6).

27. Cafe Angelo also provided the law firms' attorneys with telephone calls from judges in pending cases. (T. p. 17 and B. 6).

28. Members of the law firm occasionally dined at Cafe Angelo with Safeway's claims manager and another attorney who handled specialty work for Safeway. (T. p. 16 and B. 7).

29. Mr. Robert Parrillo, a Safeway shareholder, participated in the luncheon meetings in the dual capacity of legal counsel and client in the discussion of Safeway cases. (Transcript).

30. The law firm did not have sufficient space for any group discussions because its members and associates regularly utilized the library and conference room during normal working hours for depositions

and other business matters. (T. p. 19, entire record).

31. The lower court found the petitioner's testimony and witnesses to be credible, candid and forthright. (T. p. 48).

REASONS IN SUPPORT OF WRIT OF CERTIORARI

This Court should grant this petition for certiorari (a) because the decision of the panel of the Court of Appeals for the Seventh Circuit adopted a rationale, involving an issue of first impression in that Circuit and affecting a broad group of taxpayers and a wide array of analogous issues, that conflicts with holdings of this Court and of the Court of Appeals in the Sixth and Ninth Circuits; (b) because the rationale of the decision of the Court of Appeals for the Seventh Circuit does not have any support in the applicable statutes, their legislative history or judicial or administrative interpretation of the Code; (c) because the decision of the Court of

Appeals for the Seventh Circuit establishes new standards that conflict with settled principles of federal tax law and (d) because the decision of the Court of Appeals for the Seventh Circuit disregarded the petitioners alternative argument.

I. THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE HOLDINGS OF THE UNITED STATES SUPREME COURT IN COMMISSIONER V. HEININGER, 320 U.S. 467 (1943) AND WITH THE HOLDINGS OF THE SIXTH CIRCUIT COURT OF APPEALS IN COMMISSIONER V. LINCOLN ELECTRIC CO., 176 F.2D 815 (1949) AND THE NINTH CIRCUIT COURT OF APPEALS IN COOPER V. COMMISSIONER, 611 F.2D 1260 (1980).

Judge Posner, writing for the Court of Appeals for the Seventh Circuit, held that a tax-deductible business meal requires "social lubrication", i.e. a showing that the taxpayer is dining with an existing or prospective customer with whom the taxpayer is reducing "the costs of transacting business, for these costs include the frictions and the failures of communication that are produced by suspicion and mutual misunderstanding, by differences in tastes

and manners, and by lack of rapport. A meeting with a client or customer in an office is therefore not a perfect substitute for a lunch with him in a restaurant." (A-4) Judge Posner did not find the requisite "social lubrication" in this case because it involved only co-workers who "... know each other well already; they don't need the social lubrication that a meal with an outsider provides -- at least don't need it daily...". (A-5)

Judge Posner also held that a tax-deductible business meal requires economic loss, e.g. dining at expensive or "disagreeable" restaurants. He articulates this test by an analogy to a theatrical agent, forced by his demanding client, to eat at an expensive restaurant. "No doubt our theatrical agent ... derives personal utility from his fancy meal, but probably less than the price of the meal. He would not pay for it if it were not for the

business benefit; he would get more value from using the same money to buy something else; hence the meal confers on him less utility than the cash equivalent would." (A-4) This "economic utility" test comports with the business character of the meal, and the petitioners have established their compliance with this latter requirement because most of the expenditures in question involved meals consumed by their employees.

Judge Posner stated that "[T]he Internal Revenue Service concedes, however, that meals are deductible under Section 162(a) when they are ordinary and necessary (emphasis supplied) business expenses..." (A-2) Nonetheless, Judge Posner does not articulate the meaning of the terms "ordinary and necessary". We must assume that failure to meet the "social lubrication" test in the instant case obviates any necessity for further analysis of the Code. No other court has adopted the "social

lubrication" test or failed to consider the impact of the terms "ordinary and necessary" in the context of deductible business expenses, e.g. luncheon meetings.

Other federal courts, however, have analyzed business meals in the context of exigent circumstances. The United States Supreme Court in Commissioner v. Kowalski, 434 U.S. 77 (1977) held that a taxpayer could not exclude cash payments in lieu of meals in kind because he had the unrestricted use of the money and because Congress adopted a "business necessity theory" in the exclusion of meals provided for the employer's convenience under Section 119(a) of the Code. Treasury Regulation Section 1.119-1(a)(2)(ii)(1964) indicates that a substantial non-compensatory business reason for the provision of meals to an employee exists when the employer needs the employee "available for emergency call during the meal period" or "because the

employer's business is such that the employee must be restricted to a short meal period, such as 30-45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period."

The Court of Appeals for the Ninth Circuit in the Cooper case permitted a fireman to deduct his share of the expenses of an organized mess as an ordinary and necessary business expense under Section 162 (a) of the Code. Although Section 262 of the Code generally disallows the deduction of meals as a personal expense, that Court found that the taxpayer's participation in the mess was a condition of employment. Therefore it allowed the deduction. In reaching its decision, the Court emphasized the nature of the taxpayer's employment which required him to work long shifts and to refrain from leaving the fire station on personal business while on duty.

Similarly, the Court of Appeals for the

Eighth Circuit allowed a deduction for meals taken by a patrolman on duty at a restaurant near or adjacent to the highway. United States v. Morelan, 356 F.2d 199, 17 AFTR 2d 286 (8th Cir. 1966).

The instant case presents a very similar situation. The law firm incurred the luncheon expenses as a matter of business necessity, and it required attendance of each attorney to the extent possible. Its attorneys could not attend to personal business during the lunch hour; instead, they had to attend the luncheon meetings to discuss trial strategy and settlement negotiations, to report the progress of the morning cases and to receive assignments for that afternoon's work. Since the law firm restricted the attorneys' activities during the lunch hour, it considered the luncheon meetings as a part of their regular work day and, therefore, it paid the cost of their lunches.

The Cooper Court did not consider the exclusion of parties other than co-workers from the collective mess controlling or significant, and it did not consider or require "social lubrication" in its analysis of Section 162(a) of the Code. The Cooper Court adopted an "exigent circumstances" test which, as Judge Posner so aptly stated, precludes a deduction for all business-related meals that otherwise" .... would confer a windfall on people who can arrange (emphasis supplied) their work schedules so they do some of their work at lunch." (A-3) This Court should affirm the Cooper holding, which provides clear guidance to the meaning of the statutory requirements of "ordinary and necessary," under Section 162(a) of the Code, and this Court should reject any suggestion that a business meeting must involve "social lubrication" as a sine qua non.

Judge Wilbur, writing for the U.S. Tax

Court in the instant case, found that " ... business needs dictated the choice (emphasis supplied) of the noon hour for the daily meeting." (B-18) Commenting on the holding of the Ninth Circuit in the Cooper case, Judge Wilbur noted that the Court of Appeals stated" ... that because the taxpayer's situation was both unusual and unique, the expense was business rather than personal." (B-14-15) The instant case contains the "unique and unusual" circumstances, found in the Cooper case, because of the nature of the law firm's practice which involved an immense volume of cases, handled daily and primarily for one large client with an ongoing need for constant representation, and this Court should adopt a standard of law consistent with the Cooper holding.

Furthermore, the decision of the Court of Appeals for the Seventh Circuit has misapprehended the meaning of the terms "ordinary and necessary" under Section

162(a) of the Code, and it has overlooked extensive Treasury regulations and case law pertaining to this area of the law.

The United States Supreme Court has found that an ordinary and necessary expense deductible under Section 162(a) must be "appropriate and helpful" to the carrying on of the taxpayer's business. Judge Wilbur pointedly stated that "[I]n a very real sense, these meetings contributed to the success of the partnership." (B-18) An expenditure will qualify under the Supreme Court's test, if a taxpayer incurred it for a business purpose with the intent to obtain a specific business benefit and if the expenditure is customary in the taxpayer's trade or business. Commissioner of Internal Revenue v. Heininger, 320 U.S. 467 at 471 (1943). Judge Wilbur summed up his findings of facts in the instant case by noting in his opinion that "[I]n the instant case, we are convinced that petitioner and his

partners and associates discussed business at lunch, that the meeting was a part of their working day, and that this time was the most convenient time at which to meet. We are also convinced that the partnership benefited from the exchange of information and ideas that occurred." (B-19)

In another case involving the definition of ordinary and necessary business expenses, the United States Supreme Court denied an income tax deduction under the predecessor of Section 162 of the Code for payments of corporate debts by a corporate agent who sought to strengthen his individual standing and credit with the bankrupt corporation's former customers. See Welch v. Helvering, 290 U.S. 111 (1933). In reaching its decision in the Welch case, the U.S. Supreme court noted that "[o]rdinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them

often." 290 U.S. 111 at 1141. Realizing the amorphous character of words of everyday usage like "ordinary and necessary", the U.S. Supreme Court lamented that "[h]ere, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." 290 U.S. 111 at 114-115.

Taking its cue from the Welch case, the U.S. Tax Court denied an "ordinary and necessary" income tax deduction under Section 162 of the Code to a lawyer who ostensibly used his yacht to promote his tax business. See Henry v. Commissioner, 36 TC 879 (1961). The U.S. Tax Court in the Henry case held that ". . . it must appear that there is a proximate -- rather than merely a

remote or incidental -- relationship between the claimed expenses and petitioner's practice as a lawyer and an accountant." 36 TC 879 at 884. The Henry decision provided the following guidance to taxpayers laboring over the definition of "ordinary and necessary".

> "Applying these general principles to the instant question, petitioner has proved neither that the operation of his yacht in 1954 was 'necessary' to his professional practice, in the sense that it was 'appropriate and helpful,' Welch v. Helvering, supra, Louis Boehm, supra, nor that it was 'ordinary' in the sense that it was the 'normal and natural response under the specific circumstances' in which petitioner found himself, Donald G. Graham, 35 T.C. 273 (1960). In determining that which is 'necessary' to a taxpayer's trade or business, the taxpayer is ordinarily the best judge on the matter, and we would hesitate to substitute our own discretion for his with regard to whether an expenditure is 'appropriate and helpful,' in those cases in which he has decided to make the expenditure solely to serve the purpose of his business. Welch v. Helvering, supra. But where, as in this case, the expenditures may well have been made to further ends which are primarily personal, this ordinary constraint does not prevail;

> petitioner must show affirmatively that his expenses were 'necessary' to the conduct of his professions. See Anthony E. Spitaleri, 32 T.C. 988 (1959); Chas D. Long, supra; Richard A. Sutter, supra. We do not think petitioner has shown that the expenses of acquiring and maintaining a yacht were 'necessary' to the conduct of his professions." 36 TC 879 at 884.

The petitioners have demonstrated amply the ordinary and necessary character of the luncheon meetings to the business of the law firm within the meaning of those terms as articulated by the U.S. Supreme Court and the U.S. Tax Court.

The Court of Appeals for the Sixth Circuit denies a deduction for a business expenses, unless it is reasonable in amount and not lavish or extravagant. Commissioner v. Lincoln Electric Co., 176 F. 2d 815 at 817 (1949). On the other hand, Judge Posner, writing for the Court of Appeals for the Seventh Circuit, noted that while"... the Cafe Angelo was both convenient and not too expensive..." (A-5), the Court could

reach a different result if the attorneys had"... to eat each day either in a disagreeable restaurant, so that they derived less value from the meal than it cost them to buy it, ... or in a restaurant too expensive for their personal tastes, so that, again, they would have gotten less value than the cash equivalent." (A-5 & 6) Hence, the decision of the Court of Appeals for the Seventh Circuit will require taxpayers to eat at fancy, expensive or "disagreeable" restaurants to benefit from a tax deduction under Section 162(a) of the Code. Such a result diametrically conflicts not only with the Sixth Circuit, but also with the intent of Congress and long-standing rules of law as applied by the courts and the Internal Revenue Service (IRS).

II. THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CREATES A STANDARD OF LAW FOR WHICH NO PRIOR JUDICIAL OR LEGISLATIVE AUTHORITY EXISTS.

The Court of Appeals for the Seventh Circuit has not cited any statutory author-

ity that limits the deductibility of business meals among co-workers on the basis of frequency. The "social lubrication" test, which also has no statutory basis, provides an automatic limitation without regard to the facts and circumstances of each case because, as Judge Posner notes in his opinion, co-workers know each other well already. He suggests that a monthly luncheon among partners and associates of a large firm"... might well be necessary, ..." (A-5), but he does not consider Section 274 of the Code which Congress enacted specifically to limit deductible business expenses.

The Code does not distinguish between business meals attended only by co-workers and meals attended by outsiders. Rather, section 274(a) of the Code imposes strict record keeping on taxpayers claiming a tax-deductible "entertainment" expense. If a taxpayer satisfies the record keeping and

other requirements for substantiation of the business character of his "entertainment" expenses, Section 274 of the Code does not impose a frequency limitation.

Section 274(e)(1) of the Code provides express relief from the additional requirements of Section 274(a) of the Code for expenses for food and beverages furnished to any individual (emphasis supplied) under circumstances generally considered conducive to a business discussion. Further, Section 274(e)(6) of the Code provides express relief for entertainment expenses directly related to business meetings of a taxpayer's employees, stockholders, agents or directors. This section of the Code clearly contemplates and allows a deduction for business meals involving only co-workers. Furthermore the concurring opinion of a majority of the judges of the U.S. Tax Court in the review of Judge Wilbur's decision of this case did not consider "[the] opinion as

disallowing the cost of meals in all instances where only partners, co-workers, etc. are involved." (B-21)

The Code requires only a clear and substantial connection to business to allow an income tax deduction for meals. This test, long continued without substantial change, has received Congressional approval.

Business meals have received extensive consideration through the years, and the Courts routinely presume that Congress is aware of the administrative practice permitting the deduction of the entire expense of a business meal. The U.S. Tax Court, in its consideration of this case, recognized this fact and consistent with its decision in Sutter v. Commissioner, 21 TC 170 (1953), held that ". . . where a proper business purpose and relationship are established, the expenses are presumed to be different from one the taxpayer would normally have made." (B-11)

Petitioners have shown a clear and substantial connection between the expenditures at issue and the business of the law firm by a preponderance of the evidence. Furthermore, they have established that they incurred the expenditures directly in connection with the active conduct of, and in furtherance of, the law firm's business. Judge Wilbur in his findings of fact stated that "[T]he firm had an unwritten policy of meeting every day during the noon recess at the Cafe Angelo, a small, quiet restaurant conveniently located near the courts and the office. Over lunch the lawyers would decide who would attend various sessions;[2] discuss issues and problems that had come up in the morning; answer questions and advise each other on how to handle certain pending matters; update Mr. Parrillo on settlement negotiations; and, naturally, engage in a certain amount of social banter. Attorneys attended whenever possible for as long as

possible; sometimes they ate, at other times they merely joined in the discussions." (B-4) Judge Wilbur also stated in footnote 2 to his opinion that the law firm's attorneys reviewed the "Daily Call Sheet," a master list, prepared by the law firm's docket secretary with the case name, court number, description of matter, location and time at these luncheon meetings. Judge Wilbur also noted that at lunch they "would decide who would handle what matters and so note on the call sheet." (B-4) Accordingly the petitioners have satisfied the Sutter rule and the statutory tests of section 162(a) and section 274(e) of the Code.

We disagree with the suggestion of the Court of Appeals for the Seventh Circuit that the Code requires a taxpayer to speculate over the relative economic utility or value of the expenditure which he is seeking to deduct and that the Code disallows deductions on the basis that a taxpayer

might have put his money to better use. Businessmen do not spend their money on others, e.g. co-workers or customers, without the expectation of substantial gain. They acutely understand that the tax savings available from such expenditures never equal or exceed the expenditure itself. Micro-economic decisions to save or spend money belong to micro-economic units, e.g. tax-payers, rather than an administrative or judicial forum which cann t judge the marginal or incremental effect of continuous expenditures on business and tax revenues.

Judge Posner suggests that the case might be different if the law firm's members had to eat in a "disagreeable" restaurant or in a restaurant too expensive for their personal tastes. Judge Posner muses that only in such an instance would a taxpayer derive less value from the meal than it cost him, and therefore he can deduct the cost of the meal. This reasoning dictates that a

business meal must cost more than its expected economic benefit to qualify for a tax deduction. Hence, only taxpayers, who expect to gain little or nothing from their luncheon meetings, can deduct the cost under Judge Posner's rationale. The introduction of the concept of marginal utility does not comport with the statutory test of "ordinary and necessary" and conflicts with relevant provisions of the Code, Treasury regulations, case law and legislative history pertaining to this area of the law.

If the Court of Appeals for the Seventh Circuit, however, correctly adopted an "economic utility" analysis of business meal deductions, it should apply the entity theory rather than the aggregate theory of partnership taxation and determine the tax treatment of the expenses in issue at the partnership, e.g. business, level instead of solely from the standpoint of each individual partner. See Sections 701 and 702 of

the Code. This position comports with Section 6221 of the Code and treasury regulation 1.274-2(f)(2)(vi) which evaluate the tax consequences to a partner at the partnership level. The petitioners incurred the expenses at issue on behalf of the law firm for the benefit of the business transacted during the meals and on account of the need to conduct the meetings at lunch for the efficient representation of its major client. These meetings caused the petitioners to incur luncheon costs in excess of those amounts which they would have incurred otherwise. Consequently, like the theatrical agent in Judge Posner's opinion, the taxpayers derived less personal utility from the luncheons than their share of the cost.

Judge Wilbur in footnote 13 to his opinion pointedly notes that ". . . where the costs attributable to non-partner employees are specified, these costs may be

deductible to the partners and (emphasis supplied) compensation to the employees. That is not an issue on this record." (B-20) We respectfully disagree with the import of that statement. Because petitioners are claiming an income tax deduction under section 162(a), the Court should not disregard the deductibility of at least a portion of these expenditures on account of the failure of the IRS to claim that the associates of the law firm have taxable income equal to the economic value of the meals provided by petitioners.

III. THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IMPACTS A WIDE RANGE OF TAXPAYERS AND IMPERILS THE PREVAILING STANDARD OF PROOF FOR TAX-DEDUCTIBLE EXPENDITURES IN ISSUES ANALOGOUS TO THIS CASE.

All the Judges of the United States Tax Court reviewed this case. Such review occurs very infrequently upon a determination by the Chief Judge of the case's precedential value. All the Judges of the U.S. Tax Court have not reviewed a case

involving the application of the Sutter rule to business meals since 1953.

This case has received extensive national publicity to date. Most major legal and tax publications, e.g. the American Bar Association Journal (page 1559, Volume 69, October 1983) and The National Law Journal (page 6, edition of April 15, 1985), have noted the importance of this case. The general press, e.g. the Wall Street Journal, Chicago Tribune, Chicago Sun-Times, Chicago Daily Law Bulletin and Miami Review, have carried prominent articles on the decision in this case. All major tax reporters, including Commerce Clearing House and Prentice-Hall, Inc., have commented on this case. Every business will feel the impact of this case on the daily conduct of its affairs.

Since the Court of Appeals for the Seventh Circuit reached its conclusion in this case on an interpretation of section

162(a) of the Code, any business expense, e.g. advertising or travelling, will require an analysis under the "social lubrication" and "economic utility" tests. These new standards will produce many questions on many ordinary and necessary business expenses for many taxpayers.

For example, why should an outside salesman, who visits other businesses daily, deduct the entire cost of his business trips? Adequate social lubrication through travel can occur on a less frequent basis, e.g. monthly or weekly. Such a result conflicts with the holdings of the United States Tax Court in Heuer v. Commissioner, 32 TC 947 (1959), and McDougal, Thomas W., T.C.M. 1980-289 (Par. 80,288, P-H Memo, TCM), that once a taxpayer has established that his travel expenses do not constitute nondeductible commuting costs, he can avail himself of those deductible business expenses as frequently, e.g. daily, as he chooses.

Why should a large department store, e.g. Marshall Field & Company, deduct the entire cost of daily radio, TV or newspaper advertising? The public surely knows of the quality of its merchandise and its good reputation. Adequate social lubrication through advertising can occur on a less frequent basis, e.g. weekly or monthly. Who shall determine the appropriate level of social lubrication? The taxpayer, the IRS or the Courts? A cursory reading of the decision of the Court of Appeals for the Seventh Circuit in the instant case raises these questions. A careful reading and the passage of time will raise many more difficult questions with no legislative guidance on these new judicial standards.

The uncertainty and lack of clarity in the opinion of the Court of Appeals in this case will (1) create further uncertainty in an already murky section of the Code; (2) induce a potentially uneven and unfair

application of the Code and case law to similarly-constituted taxpayers audited by IRS agents with different views of this case; and (3) have a chilling effect on legitimate business planning by taxpayers.

IV. THE DECISION OF THE COURT OF APPEALS IN THIS CASE DID NOT RULE ON THE DEDUCTIBILITY OF THE EXPENDITURES AS OUTLAYS FOR EDUCATION, AN ISSUE RAISED IN THE LOWER COURT AND THE COURT OF APPEALS.

Petitioners argued alternatively that treasury regulation section 1.162-5(a) (1967) also supports a deduction of the law firm's luncheon costs as educational expenses. This regulation allows an income tax deduction for expenditures undertaken to maintain or improve skills required of an individual in his employment. Deductible education expenses must bear a direct and proximate relationship to the taxpayer's trade or business. James A. Carroll v. Commissioner of Internal Revenue, 418 F.2d 91 (7th Cir. 1969).

The luncheon meetings at Cafe Angelo

during the contested years allowed the law firm's attorneys to continue their professional education through discussions among themselves on current developments in insurance defense work. As trial attorneys, they needed to keep abreast of changes in the law of evidence and other trial matters. They also had discussions on various trial techniques and strategies appropriate in particular cases at these meetings. The facts in the instant case sufficiently demonstrate the required relationship between the education in question and the necessary trial skills of the law firm's attorneys. The various discussions directly related to the maintenance and improvement of the skills of the law firm's attorneys. Accordingly, the luncheon meetings qualify as educational expenses deductible under Section 162(a) of the Code.

The decision of the Court of Appeals for the Seventh Circuit did not comment on

or otherwise dispose of this argument. This Court should not leave an issue, raised in this case, unresolved for other taxpayers who may pursue such reasoning to their ultimate detriment or benefit without prior guidance available from a decision on this argument in the instant case.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this Court should grant its request for a hearing of the issues raised herein.

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1820

JOHN D. MOSS, JR. and
DIANE C. MOSS,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Petition for Review of an Order
by the United States Tax Court.

ARGUED JANUARY 17, 1985—DECIDED MARCH 27, 1985

Before CUMMINGS, *Chief Judge*, BAUER and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* The taxpayers, a lawyer named Moss and his wife, appeal from a decision of the Tax Court disallowing federal income tax deductions of a little more than $1,000 in each of two years, representing Moss's share of his law firm's lunch expense at the Cafe Angelo in Chicago. The Tax Court's decision in this case has attracted some attention in tax circles because of its implications for the general problem of the deductibility of business meals. See, e.g., McNally, *Vulnerability of Entertainment and Meal Deductions Under the Sutter Rule*, 62 Taxes 184 (1984).

Moss was a partner in a small trial firm specializing in defense work, mostly for one insurance company. Each of the firm's lawyers carried a tremendous litigation case-

load, averaging more than 300 cases, and spent most of every working day in courts in Chicago and its suburbs. The members of the firm met for lunch daily at the Cafe Angelo near their office. At lunch the lawyers would discuss their cases with the head of the firm, whose approval was required for most settlements, and they would decide which lawyer would meet which court call that afternoon or the next morning. Lunchtime was chosen for the daily meeting because the courts were in recess then. The alternatives were to meet at 7:00 a.m. or 6:00 p.m., and these were less convenient times. There is no suggestion that the lawyers dawdled over lunch, or that the Cafe Angelo is luxurious.

The framework of statutes and regulations for deciding this case is simple, but not clear. Section 262 of the Internal Revenue Code (Title 26) disallows, "except as otherwise expressly provided in this chapter," the deduction of "personal, family, or living expenses." Section 119 excludes from income the value of meals provided by an employer to his employees for his convenience, but only if they are provided on the employer's premises; and section 162(a) allows the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including— . . . (2) traveling expenses (including amounts expended for meals . . .) while away from home . . . ." Since Moss was not an employee but a partner in a partnership not taxed as an entity, since the meals were not served on the employer's premises, and since he was not away from home (that is, on an overnight trip away from his place of work, see *United States v. Correll*, 389 U.S. 299 (1967)), neither section 119 nor section 162(a)(2) applies to this case. The Internal Revenue Service concedes, however, that meals are deductible under section 162(a) when they are ordinary and necessary business expenses (provided the expense is substantiated with adequate records, see section 274(d)) even if they are not within the express permission of any other provision and even though the expense of

commuting to and from work, a traveling expense but not one incurred away from home, is not deductible. Treasury Regulations on Income Tax § 1.262-1(b)(5); *Fausner v. Commissioner*, 413 U.S. 838 (1973) (per curiam).

The problem is that many expenses are simultaneously business expenses in the sense that they conduce to the production of business income and personal expenses in the sense that they raise personal welfare. This is plain enough with regard to lunch; most people would eat lunch even if they didn't work. Commuting may seem a pure business expense, but is not; it reflects the choice of where to live, as well as where to work. Read literally, section 262 would make irrelevant whether a business expense is also a personal expense; so long as it is ordinary and necessary in the taxpayer's business, thus bringing section 162(a) into play, an expense is (the statute seems to say) deductible from his income tax. But the statute has not been read literally. There is a natural reluctance, most clearly manifested in the regulation disallowing deduction of the expense of commuting, to lighten the tax burden of people who have the good fortune to interweave work with consumption. To allow a deduction for commuting would confer a windfall on people who live in the suburbs and commute to work in the cities; to allow a deduction for all business-related meals would confer a windfall on people who can arrange their work schedules so they do some of their work at lunch.

Although an argument can thus be made for disallowing *any* deduction for business meals, on the theory that people have to eat whether they work or not, the result would be excessive taxation of people who spend more money on business meals because they are business meals than they would spend on their meals if they were not working. Suppose a theatrical agent takes his clients out to lunch at the expensive restaurants that the clients demand. Of course he can deduct the expense of their meals, from which he derives no pleasure or sustenance, but can he also deduct the expense of his own? He can, because he cannot eat more cheaply; he cannot munch

surreptitiously on a peanut butter and jelly sandwich brought from home while his client is wolfing down tournedos Rossini followed by souffle au grand marnier. No doubt our theatrical agent, unless concerned for his longevity, derives personal utility from his fancy meal, but probably less than the price of the meal. He would not pay for it if it were not for the business benefit; he would get more value from using the same money to buy something else; hence the meal confers on him less utility than the cash equivalent would. The law could require him to pay tax on the fair value of the meal to him; this would be (were it not for costs of administration) the economically correct solution. But the government does not attempt this difficult measurement; it once did, but gave up the attempt as not worth the cost, see *United States v. Correll*, *supra*, 389 U.S. at 301 n. 6. The taxpayer is permitted to deduct the whole price, provided the expense is "different from or in excess of that which would have been made for the taxpayer's personal purposes." *Sutter v. Commissioner*, 21 T.C. 170, 173 (1953).

Because the law allows this generous deduction, which tempts people to have more (and costlier) business meals than are necessary, the Internal Revenue Service has every right to insist that the meal be shown to be a real business necessity. This condition is most easily satisfied when a client or customer or supplier or other outsider to the business is a guest. Even if Sydney Smith was wrong that "soup and fish explain half the emotions of life," it is undeniable that eating together fosters camaraderie and makes business dealings friendlier and easier. It thus reduces the costs of transacting business, for these costs include the frictions and the failures of communication that are produced by suspicion and mutual misunderstanding, by differences in tastes and manners, and by lack of rapport. A meeting with a client or customer in an office is therefore not a perfect substitute for a lunch with him in a restaurant. But it is different when all the participants in the meal are coworkers, as essentially was the case here (clients occasionally were invited to the

firm's daily luncheon, but Moss has made no attempt to identify the occasions). They know each other well already; they don't need the social lubrication that a meal with an outsider provides—at least don't need it daily. If a large firm had a monthly lunch to allow partners to get to know associates, the expense of the meal might well be necessary, and would be allowed by the Internal Revenue Service. See *Wells v. Commissioner*, 36 T.C.M. 1698, 1699 (1977), aff'd without opinion, 626 F.2d 868 (9th Cir. 1980). But Moss's firm never had more than eight lawyers (partners and associates), and did not need a daily lunch to cement relationships among them.

It is all a matter of degree and circumstance (the expense of a testimonial dinner, for example, would be deductible on a morale-building rationale); and particularly of frequency. Daily—for a full year—is too often, perhaps even for entertainment of clients, as implied by *Hankenson v. Commissioner*, 47 T.C.M. 1567, 1569 (1984), where the Tax Court held nondeductible the cost of lunches consumed three or four days a week, 52 weeks a year, by a doctor who entertained other doctors who he hoped would refer patients to him, and other medical personnel.

We may assume it was necessary for Moss's firm to meet daily to coordinate the work of the firm, and also, as the Tax Court found, that lunch was the most convenient time. But it does not follow that the expense of the lunch was a necessary business expense. The members of the firm had to eat somewhere, and the Cafe Angelo was both convenient and not too expensive. They do not claim to have incurred a greater daily lunch expense than they would have incurred if there had been no lunch meetings. Although it saved time to combine lunch with work, the meal itself was not an organic part of the meeting, as in the examples we gave earlier where the business objective, to be fully achieved, required sharing a meal.

The case might be different if the location of the courts required the firm's members to eat each day either in a disagreeable restaurant, so that they derived less

value from the meal than it cost them to buy it, cf. *Sibla v. Commissioner*, 611 F.2d 1260, 1262 (9th Cir. 1980); or in a restaurant too expensive for their personal tastes, so that, again, they would have gotten less value than the cash equivalent. But so far as appears, they picked the restaurant they liked most. Although it must be pretty monotonous to eat lunch the same place every working day of the year, not all the lawyers attended all the lunch meetings and there was nothing to stop the firm from meeting occasionally at another restaurant proximate to their office in downtown Chicago; there are hundreds.

An argument can be made that the price of lunch at the Cafe Angelo included rental of the space that the lawyers used for what was a meeting as well as a meal. There was evidence that the firm's conference room was otherwise occupied throughout the working day, so as a matter of logic Moss might be able to claim a part of the price of lunch as an ordinary and necessary expense for work space. But this is cutting things awfully fine; in any event Moss made no effort to apportion his lunch expense in this way.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—3-27-85—450

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 25, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

JOHN D. MOSS, JR. and DIANE C. MOSS,	)	
Petitioners-Appellants,	)	Petition for Review
	)	of an Order by the
No. 84-1820 vs.	)	United States Tax
	)	Court.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellee.	)	

ORDER

On April 9, 1985, petitioners-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX B

80 T. C. No. 57

UNITED STATES TAX COURT

JOHN D. MOSS, JR. and DIANE C. MOSS, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 9975-80. Filed May 25, 1983.

Petitioner, a partner of a law firm specializing in litigation, met with his colleagues each day at noon to discuss firm business, e.g., case assignments, scheduling, settlements. The lunches were paid for by the partnership. Respondent disallowed petitioner's distributive share of these expenses. Held, luncheon costs incurred at these meetings are nondeductible personal expenses. Sec. 262, I.R.C. 1954.

Eugene L. Mahoney and Arnold A. Silvestri, for the petitioners.

Tom P. Quinn, for the respondent.

WILBUR, JUDGE: Respondent determined a deficiency in petitioner's Federal income tax for the taxable year 1976 of $1,125 and for 1977 of $1,351. After concessions by the respondent, the sole issue for our decision

is whether petitioner is entitled to deduct his share of the partnership's expenses representing daily business luncheon meetings.

FINDINGS OF FACT

Some of the facts have been stipulated and those facts are so found. The stipulation of facts and the attached exhibits are incorporated by this reference.

The petitioners are husband and wife who resided in Chicago, Illinois, when they timely filed the 1976 and 1977 Federal income tax returns in question. Petitioner Diane C. Moss is a party to this proceeding solely because she filed a joint return with her husband, petitioner John Moss.

Petitioner, an attorney, was a partner in the law firm Parrillo, Bresler, Weiss, & Moss in 1976 and 1977. The firm filed a partnership return for each of the years in question. It took a deduction each year for "meetings and conferences." Petitioner has

claimed his share of the firm's expense on his individual return.

Parrillo, Bresler, Weiss, & Moss was a firm of 6 or 7 lawyers who specialized in insurance defense work. Their case load was extremely heavy. Most of the lawyers spent the better part of each day participating in or preparing for depositions and trials throughout the greater Chicago area. Judges often held hearings on short notice, thus making it necessary for the firm to assign cases and plan schedules at the last minute.

Robert Parrillo, the senior partner, was responsible for all cases involving the firm's major client, the Safeway Insurance Company.[1] His partners and associates handled the details of these cases, but no final settlements were made without his approval.

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[1] Petitioner's partner Robert Parrillo testified at trial that about 85-90 percent of the law firm's income and legal work came from the Safeway Insurance Company.

The firm had an unwritten policy of meeting every day during the noon recess at the Cafe Angelo, a small, quiet restaurant conveniently located near the courts and the office. Over lunch the lawyers would decide who would attend various sessions;[2] discuss issues and problems that had come up in the morning; answer questions and advise each other on how to handle certain pending matters; update Mr. Parrillo on settlement negotiations; and, naturally, engage in a certain amount of social banter. Attorneys attended whenever possible for as long as possible; sometimes they ate, at other times they merely joined in the discussions.

The law firm paid for the meals eaten during the noontime meetings. In 1976, the

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[2] Petitioner introduced into evidence several examples of the firm's "Daily Call Sheet." This master list, prepared by the docket secretary, showed the case name, court number, "call" (or what item was pending), location, and time of all matters scheduled. At lunch the attorneys would decide who would handle what matters and so note on the call sheet.

total bill was $7,113.85;[3] in 1977, they spent $7,967.85. The bill from the Cafe Angelo represents the bulk of the firm's "meeting and conference" expense.[4]

The noon hour was the most convenient and practical time for the firm to have its daily meeting.[5] The courts were almost always in recess at this time, so most attorneys could attend. The more experienced members of the firms were available to advise

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[3] The statutory notice of deficiency and other work papers of the respondent show the expense as $7,103.85, although the stipulation of facts list it as $7,113.85. This latter figure appears to be the correct sum of the monthly bills from Cafe Angelo, and we will accept it as such.

[4] The partnership return shows a 1976 meeting and conference expense of $7,894, of which $7,113.85 was spent at the Cafe Angelo. In 1977 the figures were $8,670 and $7,967.85, respectively.

[5] At trial respondent suggested several other times at which the partners and associates could conceivably have met. While we agree that it would have been possible to meet at 7 a.m. or 6 p.m., we believe Mr. Parrillo's testimony that such meetings would have been less well attended and less effective.

and educate the fledgling litigators. Parrillo was there to discuss and approve settlements. The Cafe Angelo provided a good location, efficient service, reasonable prices, and a place where judges could locate the attorneys.

In its statutory notice of deficiency, respondent disallowed petitioner's distributive share of the Cafe Angelo expense, along with other items upon which the parties have reached an agreement.

OPINION

Petitioner is a partner in a Chicago law firm that met every business day in 1976 and 1977 at the Cafe Angelo for lunch. Current litigation problems, scheduling, assignments, and settlement of cases were discussed at that time. The firm paid for the meals of those lawyers who ate during the firm meetings. The issue for decision is whether petitioner may deduct his share of those expenses in calculating his taxable income.

Petitioner contends that the luncheon meeting expenses are deductible under section 162[6] as ordinary and necessary business expenses. In the alternative he claims that they qualify for deduction under section 1.162-5, Income Tax Regs., as outlays for education. Respondent, conversely, claims that the lunches are a personal and therefore nondeductible expense. We agree with respondent.[7]

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[6] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue.

[7] Respondent has directed virtually all of his fire to his argument under sec. 162. Nevertheless, he also suggests that the deduction should be denied as petitioner has not provided adequate substantiation as required by sec 274(d). The parties stipulated the daily "guest checks" establishing the date, place, and amount spent at the lunches; they also stipulated the corresponding checks by which each of the bills was paid. Additionally, copies of the "daily call sheets" were stipulated; there is no dispute that these call sheets introduced in evidence were a significant item discussed at the luncheons. The lawyers in the firm (with the exception of a rare guest) were the only ones eating. Respondent's sec. 274 arguments

The broad purpose of the Internal Revenue Code is to tax all accessions to wealth, "from whatever source derived." Section 61(a). The goal being to tax income, business expenses reduce taxable income. Section 162. Funds spent on personal consumption, on the other hand, are not deductible. Section 262. The boundary line dividing personal expenses from business expenses, often obscurely marked, has been a fertile field of battle. The taxpayer bears the burden in these skirmishes. Welch v. Helvering, 290 U.S. 111 (1933); Rule 142(a), Tax Court Rules of Practice and Procedure. In close contests it is essential to bear in mind that the provisions of section 262 take priority over section 162. Sharon v. Commissioner, 66 T.C.

7, continued

seem to reflect a decision to leave no arrow remaining in his quiver. While we have doubts that his argument has validity on the facts before us, our decision on the first issue makes it unnecessary to decide whether he is wide of the mark.

515, 522-523 (1976), affd. per curiam 591 F.2d 1273 (9th Cir. 1978).

The expense in question is close to that evanescent line dividing personal and business expenses. From the perspective of the partnership, the lunches were a cost incurred in earning their income. The lawyers needed to coordinate assignments and scheduling of their case load, and the noon hour was a logical, convenient time at which to do so. They considered the meeting to be part of their working day, not as an hour of reprieve from business affairs. The individuals did not feel free to make alternate plans, or to eat elsewhere. For this firm, petitioner argues, the meeting was both ordinary and necessary.

The Commissioner focuses not on the circumstances bringing the partnership together each day, but rather on the fact that the individuals were eating lunch while they were together. Rather than to section

162, he looks to section 262, and the regulations which specifically categorize meals as personal expenses.[8] Section 1.262-5, Income Tax Regs. The respondent, in essence, argues that while the meeting may have been ordinary and necessary to the business, the outlay was for meals, a personal item.

The dual nature of the business lunch has long been a difficult problem for legislators and courts alike. The traditional view of the courts has been that if a personal living expense is to qualify under section 162, the taxpayer must demonstrate that it was "different from or in excess of that which would have been made for the taxpayer's personal

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[8] SEC. 1.262-1. Personal, living and family expenses. * * *
(b) * * *
(5) * * * Except as permitted under section 162, 212, or 217 the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

purposes." Sutter v. Commissioner, 21 T.C. 170, 173 (1953).[9]

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[9] A similar balance governs the tension between secs. 213 and 262. Satisfaction of nutritional needs is presumptively personal, yet when medical conditions require specially prepared foods we have allowed a deduction for the additional costs because "the sole benefit received for the added expenses was the relief from medical infirmities." Randolph v. Commissioner, 67 T.C. 481, 488 (1976); Cohn v. Commissioner, 38 T.C. 387 (1962); cf. Taylor v. Commissioner, T.C. Memo. 1982-114 (no sec. 213 deduction because "there is no showing * * * that the substitute foods * * * were more expensive than the other foods.").

The present circumstances do not require an exploration of the dimensions of our opinion in Sutter v. Commissioner, 21 T.C. 170 (1953). We note, however, that in the case of business meals Sutter permits a deduction where the expense is "different from or in excess of" the personal expenditure the taxpayer would otherwise have made. This language is in the disjunctive. Business meals have received extensive Congressional consideration through the years. Accordingly, Congress is presumed to be aware of the administrative practice permitting the entire expense of a business meal to be deducted without fragmentation. In essence, where a proper business purpose and relationship are established, the expenses are presumed to be different from one the taxpayer would normally have made.

Following the Sutter formula, numerous taxpayers have attempted to deduct the cost of meals eaten under unusual or constraining circumstances. The claims have been denied almost invariably. See e.g., Fife v. Commissioner, 73 T.C. 621 (1980) (attorney may not deduct cost of meals eaten in restaurants due to late client meetings); Ma-Tran Corp. v. Commissioner, 70 T.C. 158 (1978) (corporation may not deduct cost of officer's locally consumed meals absent travel or compliance with section 274); Drill v. Commissioner, 8 T.C. 902 (1947) (construction worker cannot deduct cost of dinners on nights he worked overtime).[10]

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[10] See also Hirschel v. Commissioner, T.C. Memo. 1981-189, affd. without published opinion 685 F.2d 424 (2d Cir. 1982) (taxpayer--student may not deduct cost of meals on nights when class meets after work); Moscini v. Commissioner, T.C. Memo. 1977-245 (policeman may not deduct restaurant meals eaten while on duty even though police regulations forbid him to leave city limits); Antos v. Commissioner, 570 F.2d 350 (9th Cir. 1978), affg. without published opinion T.C. Memo. 1976-89 (taxpayer CPA may not deduct cost of meals eaten while working late in his own office).

Daily meals are an inherently personal expense, and a taxpayer bears a heavy burden in proving they are routinely deductible.

Petitioner relies on Wells v. Commissioner, 626 F.2d 868 (9th Cir. 1980), affg. without published opinion T.C. Memo. 1977-419, in support of his position.[11] In Wells, we denied a deduction claimed by a public defender for the cost of occasional lunch meetings with his staff. The Court noted, however, that in a law firm, "an occasional luncheon meeting with the staff to discuss the operation of the firm would be regarded as an 'ordinary and necessary expense.'" We note, first, that this statement is dictum in a memorandum opinion, and thus not controlling. Second, that case referred to occasional lunches, a far cry from the daily sustenance involved in the case at bar. Even assuming that Wells is of

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[11] Cf. Lennon v. Commissioner , T.C. Memo. 1978-176.

any assistance to petitioner, we need not decide where the line between these two cases should be drawn, for we are convinced that outlays for meals consumed 5 days per week, 52 weeks per year would in any event fall on the nondeductible side of it.

The only recent cases where deductions were allowed for meals taken on a regular basis were Sibla v. Commissioner, 611 F.2d 1260 (9th Cir. 1980), affg. 68 T.C. 422 (1977) and Cooper v. Commissioner, 67 T.C. 870 (1977). Those cases involved Los Angeles firemen who were required to contribute to a meal fund for each day they were on duty, regardless of whether they ate or even were present at the fire station. This Court allowed them to deduct the expense under section 162; a concurring opinion would have allowed the expense by analogy to section 119. Cooper, supra at 874-876. On appeal the Ninth Circuit approved of both theories, stating that because the taxpayer's situation

was both unusual and unique, the expense was business rather than personal.[12]

The decision by the Ninth Circuit implies that similar considerations are involved in determining whether a meal is business expense under section 162 and whether the value of a meal supplied by an employer should be included in gross income under section 61. Section 119 provides a limited exception to section 61 by allowing an employee to exclude such amounts if the

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[12] Two cases decided after Sibla v. Commissioner, 611 F.2d 1260 (9th Cir. 1980), affg. 68 T.C. 422 (1977) and Cooper v. Commissioner, 67 T.C. 870 (1977) have effectively confined that holding to its facts. In Duggan v. Commissioner, 77 T.C. 911 (1981), a Minnesota fireman was denied a deduction for contributions to the firehouse mess. The Court found that, unlike Sibla and Cooper, Duggan was not required to participate in the common mess, nor was he forced to pay for meals he did not eat. Also, the mess was organized by the employees rather than the employer. And in Banks v. Commissioner, T.C. Memo. 1981-490, this Court again denied the deduction, stating that "the single fact that the meal was required to be eaten at the fire station did not convert the cost of such into a business expense."

meal is furnished on the business premises for the convenience of the employer. The cases decided under section 119 have focused on the degree to which the employee's actions are restricted by his employer's demands. Sibla, supra at 1265; Commissioner v. Kowalski, 434 U.S. 77 (1977). Language referring to compliance with the demands of one's employer can also be found in section 162 cases decided by this Court. See e.g. Moscini v. Commissioner , T.C. Memo. 1977-245 ("restrictions on the manner in which petitioner could take his meals while on duty were not so significant that they transformed an essentially personal expense into a business expense."); cf. Hirschel v. Commissioner , T.C. Memo. 1981-189.

Petitioner relies on this notion of restriction in contending that the cost of the lunches, like the cost of the firehouse mess in Sibla and Cooper, should be deductible. He argues that the attorneys "con-

sidered the luncheon meetings as a part of their regular work day," and that the firm incurred the expense "solely for the benefit of its practice and not for the personal convenience of its attorneys."

Petitioner has not explained, however, how this "restriction" is any different than that imposed on an attorney who must spend his lunch hour boning up on the Rules of Civil Procedure in preparation for trial or reading an evidence book to clarify a point that may arise during an afternoon session. In all these cases, the lawyer spends an extra hour at work. The mere fact that this time is given over the noon hour does not convert the cost of daily meals into a business expense to be shared by the Government.

In Sibla and Cooper, on the other hand, the firemen were required by law to contribute to the communal meals; the petitioner in Cooper was threatened with dismissal when he refused to pay for days

when he was on duty but not at the station. The involuntary nature of the payment, and the taxpayer's limited ability to eat the meal for which he was paying combined to create a unique circumstance which justified allowance of the deduction. No such unique situation is presented here. On the contrary, petitioner is much like employees in all fields who find it necessary to devote their lunch hour to work-related activities.

In agreeing with the Commissioner on this point, we are well aware that business needs dictated the choice of the noon hour for the daily meeting. In a very real sense, these meetings contributed to the success of the partnership. But other costs contributing to the success of one's employment are treated as personal expenses. Commuting is obviously essential to one's continued employment, yet those expenses are not deductible as business expenses. Section 1.262-1, Income Tax Regs. As this Court stated in Amend v.

Commissioner, 55 T.C. 320, 325, 326 (1970):

[T]he common thread which seems to bind the cases together is the notion that some expenses are so inherently personal that they simply cannot qualify for section 162 treatment irrespective of the role played by such expenditures in the overall scheme of the taxpayers' trade or business. * * *

"A businessman's suit, a saleslady's dress, the accountant's glasses are necessary for their business but the necessity does not overcome the personal nature of these items and make them a deductible business expense. * * *" [Quoting Bakewell v. Commissioner, 23 T.C. 803, 805 (1955); fn. ref. omitted.]

In the instant case, we are convinced that petitioner and his partners and associates discussed business at lunch, that the meeting was a part of their working day, and that this time was the most convenient time at which to meet. We are also convinced that the partnership benefitted from the exchange of information and ideas that occurred.

But this does not make his lunch deductible any more than riding to work together each morning to discuss partnership affairs would make his share of the commuting costs deductible. If only the four partners

attended the luncheons, petitioner's share of the expenses (assuming they were coequal partners) would have corresponded to his share of the luncheons. This is not an occasion for the general taxpayer to share in the cost of his daily sustenance. Indeed, if petitioner is correct, only the unimaginative would dine at their own expense.[13]

Petitioner argues, in the alternative, that the cost of the meals may be deducted under Sec. 1.162-5(a), Income Tax Regs. as an educational expense. Certainly the trading of information and ideas was beneficial to younger and older attorneys alike, and in that sense the lunches were educational. However, we find no cases supporting a deduction for informal training of the type that occurred here. Nor do we think Congress intended every occasion upon which infor-

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[13] We note that where the costs attributable to non-partner employees are specified, these costs may be deductible to the partners and compensation to the employees. That is not an issue on this record.

mation was imparted to qualify for deduction under section 1.162-5(a), Income Tax Regs. Again, combining nourishment with enlightenment does not make the nourishment deductible.

Decision will be entered under Rule 155.

Reviewed by the Court.

STERRETT, J., concurring: I concur in the result in this particular case but I want to make it clear that I do not view this opinion as disallowing the cost of meals in all instances where only partners, co-workers, etc., are involved. We have here findings that the partners met at lunch because it was "convenient" and "convenient" 5 days a week, 52 weeks a year.

Tannenwald, Fay, Goffe, Whitaker, Korner, Shields, Hamblen and Cohen JJ., agree with this concurring opinion.

UNITED STATES TAX COURT

JOHN D. MOSS, JR. and DIANE MOSS,	)	
Petitioners,	)	
v.	)	Docket No. 9975-80
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

D E C I S I O N

Pursuant to the opinion of the Court filed May 25, 1983, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1976 in the amount of $1,040.00; and

That there is a deficiency in income tax due from the petitioners for the taxable year 1977 in the amount of $913.00.

(Signed) RICHARD C. WILBUR

Judge.

Entered: Jan. 17, 1984

* * * * *

APPENDIX C

APPENDIX C

Text of Statutes and Treasury Regulations

Statutes

Code Section 119. Meals or Lodging Furnished for the Convenience of the Employer.

(a) Meals and Lodging furnished to Employee, His Spouse, and His Dependents, Pursuant to Employment. - There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if -

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment. ...

Code Section 162. Trade or Business Expenses

(a) In General. - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .

Code Section 262. Personal, Living, and Family Expenses

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Code Section 274. Disallowance of Certain Entertainment, Etc., Expenses

(a) Entertainment, Amusement, or Recreation.

(1) In general. - No deduction otherwise allowable under this chapter shall be allowed for any item -

(A) Activity. - With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with, the active conduct of the taxpayer's trade or business, or . . .

(e) Specific Exceptions to Application of Subsection (a) - Subsection (a) shall not apply to -

(1) Business Meals - Expenses for food and beverages furnished to any individual under

circumstances which (taking into account the surroundings in which furnished, the taxpayer's trade, business, or income-producing activity and the relationship to such trade, business or activity of the persons to whom the food and beverages are furnished) are of a type generally considered to be conducive to a business discussion ...

6) Employee, stockholder, etc., business meetings. - Expenses incurred by a taxpayer which are directly related to business meetings of his employees, stockholders, agents, or directors.

CODE SEC. 701. PARTNERS, NOT PARTNERSHIP, SUBJECT TO TAX

A partnership as such shall not be subject to the income tax imposed in this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

CODE SEC. 702. INCOME AND CREDITS OF PARTNER

(a) General Rule. - In determining his income tax, each partner shall take into account separately his distributive share of the partnership's -

(1) gains and losses from sales

or exchanges of capital assets held for not more than 1 year,

(2) gains and losses from sales or exchanges of capital assets held for more than 1 year,

(3) gains and losses from sales or exchanges of property described in Section 1231 (relating to certain property used in a trade or business and involuntary conversations),

(4) charitable contributions (as defined in Section 170(c)),

(5) dividends or interest with respect to which there is an exclusion under Section 116 or 128, or a deduction under part VIII of subchapter B,

(6) taxes, described ir Section 901, paid or accrued to foreign countries and to possessions of the United States,

(7) other items of income, gain, loss, deduction, or credit, to the extent provided by regulations prescribed by the Secretary, and

(8) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection.

(b) Character of Items Constituting Distributive Share. - The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly from the source from which realized

by the partnership, or incurred in the same manner as incurred by the partnership.

(c) Gross Income of a Partner. - In any case where it is necessary to determine the gross income of a partner for purposes of this title, such amount shall include his distributive share of the gross income of the partnership.

(d) Cross Reference. -

For rules relating to procedures for determining the tax treatment of partnership items see subchapter C of Chapter 63 (Section 6221 and following).

CODE SEC. 6221. TAX TREATMENT DETERMINED AT PARTNERSHIP LEVEL

Except as otherwise provided in this subchapter, the tax treatment of any partnership item shall be determined at the partnership level.

Administrative Regulations & Rulings

Treas. Reg. Sec. 1.119-1(a)(2). Meals furnished without a charge.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demontrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or

will result, in the employer calling on the employee to perform his job during his meal period.

(b) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak workload occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (b) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(c) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (c) when there are insufficient eating facilities in the vicinity of the employer's premises.

(d) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(e) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employee will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(f) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such an employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

Treas. Reg. Sec. 1.162-1 Business expenses.

> (a) In general. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than Section 162 ... Among the items included in business expenses are management expenses, commissions (but see Section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see Section 1.162-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar

losses in the case of a business, and rental for the use of business property ... A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under Section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy. See Section 162(c), (f), and (g) and the regulations thereunder. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is deductible, even though such expenses exceed the gross income derived during the taxable year from such business ...

Treas. Reg. Sec. 1.162-5. Expenses for Education.

(a) General Rule. Expenditures made by an individual for education (including research undertaken as part of his educational program) ... are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education -

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status or rate of compensation.

Treas. Reg. Sec. 1.262-1(b)(5).

> ... Except as permitted under Section 162, 212, or 217, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

Treas. Reg. Sec. 1.274-2(b) Definitions - (1) Entertainment defined - (i) In general.

> ... The term entertainment may include an activity, the cost of which is claimed as a business expense by the taxpayer, which satisfies the personal, living, or family needs of any individual, such as providing food and beverages, a hotel suite, or an automobile to a business customer or his family ...

Treas. Reg. Sec. 1.274-2(f)(2)(i) Business meals and similar expenditures -

> (a) In general. Any expenditure for food and beverages furnished to an individual under circumstances of a type generally considered conducive to business discussion (taking into account the surroundings in which furnished, the taxpayer's trade, business, or income-producing activity, and the relationship to such trade, business or activity of the persons to whom the food or beverages are furnished) is not subject to the limitations on allowability of deductions provided for in paragraphs (a) through (e) of this section. There is no requirement that business actually be discussed for its exception to apply.

(b) Surroundings. The surroundings in which the food or beverages are furnished must be such as would provide an atmosphere where there are no substantial distractions to discussion. This exception applies primarily to expenditures for meals and beverages served during the course of a breakfast, lunch or dinner meeting of the taxpayer and his business associates at a restaurant, hotel dining room, eating club or similar place not involving distracting influences such as a floor show. This exception also applies to expenditures for beverages served apart form meals if the expenditure is incurred in surroundings similarly conducive to business discussion, such as an expenditure for beverages served during the meeting of the taxpayer and his business associates at a cocktail lounge or hotel bar not involving distracting influences such as a floor show. This exception may also apply to expenditures for meals or beverages served in the taxpayer's residence on a clear showing that the expenditure was commercially rather than socially motivated. However, this exception, generally, is not applicable to any expenditure for meals or beverages furnished in circumstances where there are major distractions not conducive to business discussion, such as at night clubs, sporting events, large cocktail parties, sizeable social gatherings, or other major distracting influences.

(c) Taxpayer's trade or business and relationship of persons entertained. The taxpayer's trade, business, or income-producing activity and the relationship of the persons to whom the food or beverages are served to

such trade, business or activity must be such as will reasonably indicate that the food or beverages were furnished for the primary purpose of furthering the taxpayer's trade or purpose. Such a business purpose would be indicated, for example, if a salesman employed by a manufacturing supply company meets for lunch during a normal business day with a purchasing agent for a manufacturer which is a prospective customer. Such a purpose would also be indicated if a life insurance agent meets for lunch during a normal business day with a client.

Treas. Reg. Sec. 1.274-2(f)(2)(vi) Employee, stockholder, etc., business meetings.

Any expenditure by a taxpayer for entertainment which is directly related to bona fide business meetings of the taxpayer's employees, stockholders, agents or directors held principally for discussion of trade or business is not subject to the limitations on allowability of deductions provided for in paragraphs (a) through (e) of this section. For purposes of this exception, a partnership is to be considered a taxpayer and a member of a partnership is to be considered an agent. (Emphasis supplied) ...

Treas. Reg. Sec. 1.702-1(b)

(b) Character of items constituting distributive share. - The character in the hands of a partner of any item of income, gain, loss, deduction, or credit described in Section 702(a)(1) through (8) shall be determined as if such item were

realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership. For example, a partner's distributive share of gain from the sale of depreciable property used in the trade or business of the partnership shall be considered as gain from the sale of such depreciable property in the hands of the partner. Similarly, a partner's distributive share of partnership "hobby losses" (Section 270) or his distributive share of partnership charitable contributions to organizations qualifying under Section 170(b)(1)(A) retains such character in the hands of the partner.

Supreme Court, U.S.
FILED
OCT 21
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-144

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN D. MOSS, JR., ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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COMMISSIONER OF INTERNAL REVENUE

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that he was not entitled to a tax deduction for the cost of eating lunch daily. The decision below is correct, the question is factual, and there is no conflict among the circuits or other consideration warranting this Court's review.

1. Petitioner John D. Moss, Jr., is a partner in a Chicago law firm.[1] The firm, which consisted of four partners and four associates, followed the practice of meeting for lunch each working day at a restaurant (Pet. App. B4). Petitioner and his colleagues generally discussed firm business while eating lunch. Attendance was not mandatory, but the lawyers generally attended whenever possible for as long as

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[1]Petitioner Diane C. Moss is a party solely by virtue of having filed a joint federal income tax return with her husband for the tax years at issue.

possible (*ibid.*). Sometimes they would not actually have lunch but merely join in the discussion (*ibid.*).

The firm paid the restaurant bills thus incurred. For federal tax purposes, the firm deducted those costs on its partnership tax return as an expense of "meetings and conferences" (*id.* at B2). Petitioner in turn deducted his distributive share of the aggregate annual lunch bill as an "ordinary and necessary expense[] paid or incurred * * * in carrying on any trade or business" under Section 162(a) of the Code.[2]

The Commissioner on audit of petitioner's 1976-1977 tax returns disallowed the claimed deductions. Section 262 of the Code, he noted, provides that "no deduction shall be allowed for personal, living, or family expenses," and the regulations generally provide that "the costs of [a] taxpayer's meals not incurred in traveling away from home are personal expenses" (Treas. Reg. § 1.262-1(b)(5)). In the Commissioner's view, petitioner's daily cost of lunch resembled costs incurred by a taxpayer in commuting to work—costs which, despite their arguable business nexus, nevertheless "are personal expenses and do not qualify as deductible expenses." Treas. Reg. § 1.262-1(b)(5).

Petitioner sought redetermination of the resulting deficiencies in the Tax Court, which, in a reviewed opinion, unanimously upheld the Commissioner's position (Pet. App. B1-B21). The court observed that "[t]he boundary line dividing personal expenses from business expenses [is] often obscurely marked" and that "[t]he taxpayer bears the burden [of proof] in these skirmishes" (Pet. App. B8-B9). In holding that petitioner's lunch costs "f[e]ll on the nondeductible side" of the line, the court noted that these

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[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax years at issue (the Code or I.R.C.).

expenses reflected, not "occasional luncheon meeting[s]," but "[d]aily meals" which, as "an inherently personal expense," a taxpayer "bears a heavy burden in proving * * * routinely deductible" (*id.* at B13-B14). The court also noted that petitioner's presence at the restaurant was voluntary; he was neither "required to participate" in the meals "nor was he forced to pay for meals he did not eat" (*id.* at B14-B16 & n.12). "On the contrary," the court noted, "petitioner is much like employees in all fields who find it necessary to devote their lunch hour to work-related activities" (*id.* at B18). People often feel constrained to eat lunch at their desks; if that were sufficient to "convert the cost of daily meals into a business expense to be shared by the Government," the Tax Court observed, "only the unimaginative would dine at their own expense" (*id.* at B17, B20 (footnote omitted)). Nine judges concurred, noting their agreement with "the result in this particular case," but expressing the view that the court's opinion did not "disallow[] the costs of meals in all instances where only partners, co-workers, etc. are involved" (*id.* at B21).

The court of appeals unanimously affirmed (Pet. App. A1-A6). In addition to the facts cited by the Tax Court, the court of appeals emphasized that petitioner's meals differed from the typical "business lunch" in that "all the participants in the meal [were] coworkers" (*id.* at A4). Whereas a large law firm might properly deduct the cost of "a monthly lunch to allow partners to get to know associates," petitioner's firm "never had more than eight lawyers * * * and did not need a daily lunch to cement relationships among them" (*id.* at A5). The court noted that "[t]he case might be different" if different facts were involved (*id.* at A5-A6), but held that the Commissioner had properly disallowed the deductions on the facts presented.

2. The decisions below are correct. As the court of appeals noted, the question whether the cost of a meal represents an ordinary and necessary business expense rather than a nondeductible personal expenditure "is all a matter of degree and circumstance" (Pet. App. A5). In holding that personal preferences predominated here, the courts below properly relied on three principal facts: the frequency of the meals, which were "consumed 5 days per week, 52 weeks per year" (Pet. App. A5, B14); the absence of employer-imposed restrictions, which left petitioner and his colleagues free to eat or not to eat and in any event to "pick[] the restaurant they liked most" (*id.* at A5-A6, B16-B17); and the fact that all the diners were co-workers, which meant that the cost of the meals, as distinguished from the conversation, had no obvious "business" connection, lacking the "social lubrication" rationale that justifies a business-expense deduction for certain meals consumed with clients and other outsiders (*id.* at A4-A5).

In thus balancing the facts, the courts below reached a result consistent not only with the statute and the regulations but also with common sense. The cost of commuting to work every day would not become deductible merely because one happened to think about work, or to talk to one's car-pool companions about work, on the way to the office. See Treas. Reg. § 1.262-1(b)(5). Equally obviously, the cost of "daily sustenance" (Pet. App. B13) does not become deductible simply because people contrive to "arrange their work schedules so they do some of their work at lunch" (*id.* at A3). The question in any event is factual and merits no further review.[3]

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[3]Contrary to petitioner's contention (Pet. 14, 22), the decision below does not conflict with *Commissioner* v. *Heininger*, 320 U.S. 467 (1943). This Court there upheld the deductibility of legal expenses incurred by a taxpayer "to defend his business from threatened destruction" stemming from allegations that he had made false representations through

3. Petitioner alternatively contends, seemingly as an afterthought (Pet. i, 40-42), that he is entitled to deduct the cost of his lunch as an "educational expense." See generally Treas. Reg. § 1.162-5. The Tax Court succinctly rejected this argument (Pet. App. B20-B21). It found "no cases supporting a deduction for informal training of the type that occurred here" and it held that "combining nourishment with enlightenment does not make the nourishment deductible" (*ibid.*). The court of appeals did not expressly consider this argument, evidently believing it frivolous, which it is.[4]

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the mail (320 U.S. at 471); obviously, the Court in that case had no occasion to address the deductibility of routine daily expenditures incurred primarily for personal reasons. Equally mistaken is petitioner's contention (Pet. 14, 20-21, 26-27) that the decision below conflicts with *Commissioner* v. *Lincoln Electric Co.*, 176 F.2d 815 (6th Cir. 1949), cert. denied, 338 U.S. 949 (1950), and with the companion cases of *Sibla* v. *Commissioner* and *Cooper* v. *Commissioner*, 611 F.2d 1260 (9th Cir. 1980). In the former case, the Sixth Circuit held that the reasonableness, and hence the deductibility, of an employer's payments to an employee retirement plan was "a question of fact for determination in the first instance by the Tax Court" (176 F.2d at 818). In the latter cases, the Ninth Circuit upheld the deduction by firemen of contributions they were required to make to "a mandatory organized mess at the firehouse where they were stationed," contributions that were required regardless of whether they ate the meals or were present at the fire station when the meals were consumed (611 F.2d at 1261). As the Tax Court observed below, later decisions "have effectively confined that holding to its facts" (Pet. App. B15 n.12). In any event, the Tax Court correctly distinguished those cases from this one, since petitioner "was not required to participate" in the law firm's meals and was not "forced to pay for meals he did not eat" (*ibid.*).

[4]Petitioner suggests at one point (Pet. 35-36) that, even if he cannot deduct the cost of his own meals as a business or educational expense, he should be entitled to deduct that portion of his distributive share of the partnership lunch bill which represented meals consumed by the firm's associates. Petitioner did not make this argument below, presumably because it would entail taxation of the lunches' value to the associates as additional salary income (see Pet. App. B20 n.13), and neither court below accordingly considered it. As the Tax Court noted, (*ibid.*), moreover, this argument is not properly presented on the record

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

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of this case, since petitioner introduced no evidence supporting an allocation of lunch costs based on the partners' and the associates' respective gustatory habits.